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No. 89-525

In the Supreme Court of the United States

OCTOBER TERM, 1989

AHMADE RATEB POPAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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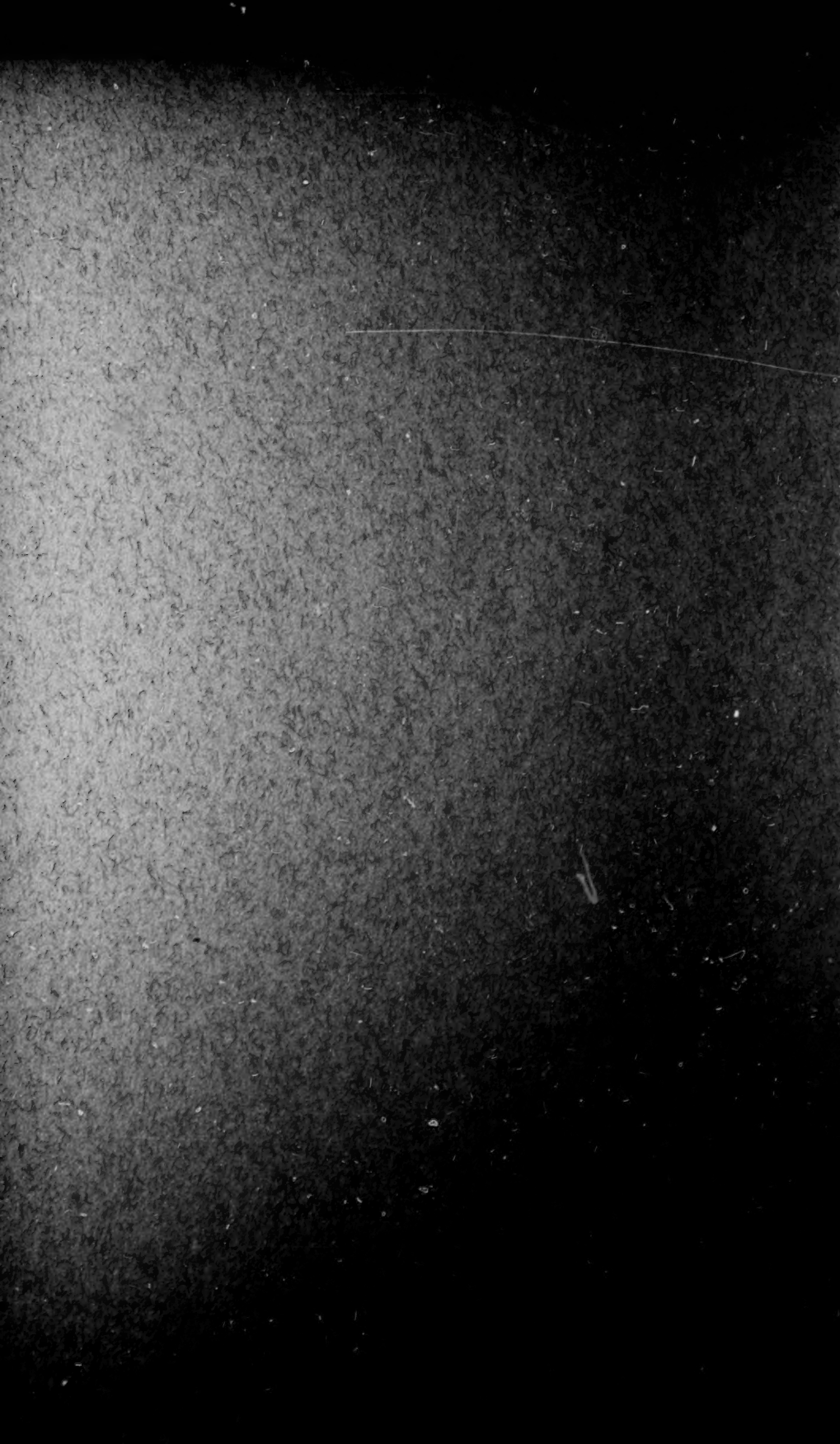

QUESTION PRESENTED

Whether petitioner's convictions must be reversed because a magistrate presided over jury selection at his trial, even though petitioner's counsel consented to that procedure.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1989. A petition for rehearing, which was filed out of time, is currently pending before the court of appeals.[1] The petition for a writ of certiorari was filed on September 26, 1989, and therefore is untimely under Rule 20.1 of the Rules of this Court if the date of the court of appeals' judgment

[1] The court of appeals granted petitioner's request to file the petition out of time.

is viewed as the start of the 60-day period. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of importing more than a kilogram of heroin into the United States, 21 U.S.C. 952(a), possessing more than a kilogram of heroin with intent to distribute it, 21 U.S.C. 841(a)(l), and conspiring to violate the Controlled Substances Act, 21 U.S.C. 846. He was sentenced to a term of 151 months' imprisonment and fined $50,000. The court of appeals affirmed. Pet. App. la-3a.

1. On September 7, 1988, the district court held a pretrial status conference. Petitioner's counsel, who had requested the conference, waived petitioner's right to be at the conference. Supp. Br. App. 2a. During the conference, the district court asked petitioner's counsel whether he "ha[d] a problem with the magistrate selecting the jury." *Id.* at 3a. Petitioner's counsel replied: "No, I have no problem with that." *Ibid.*[2] A magistrate therefore presided over jury selection, and after the trial petitioner was found guilty of the charges described above.

2. On appeal, petitioner did not raise as an issue the district court's referral of jury selection to a magistrate. Instead, petitioner challenged the sufficiency of the evidence

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[2] Thus the petition inaccurately states (Pet. 4-5 & n. 1) that the district judge did not seek consent before he assigned jury selection to the magistrate. Since the filing of the petition, petitioner's counsel in this Court has obtained the transcript of the September 7, 1989, conference, which clearly shows that petitioner's trial counsel consented to the delegation of jury selection to a magistrate. On November 21, 1989, petitioner served the government with a supplemental brief that acknowledges that point.

and the district court's refusal to depart from the federal sentencing guidelines. The court of appeals rejected both of those arguments. Pet. App. la-3a.

On July 19, 1989, after the court of appeals had issued its decision, petitioner claimed, for the first time, that the trial court's referral of jury selection to a magistrate required reversal of his convictions. Pet. 6. In a letter to the court of appeals, petitioner's counsel referred to this Court's decision in *Gomez* v. *United States,* 109 S. Ct. 2237 (1989), in which the Court reversed a conviction where a magistrate conducted jury selection over the objection of the defendant. Petitioner later received the court of appeals' permission to file an untimely petition for rehearing raising the question whether *Gomez* required reversal of his conviction. That petition for rehearing is now pending.

ARGUMENT

1. Petitioner frames the question presented (Pet. i) as whether his convictions must be reversed because a magistrate presided over jury selection without petitioner's consent. That question, however, is not properly presented for review for two reasons.

First, the transcript of the pretrial proceedings – which petitioner's counsel did not have when he prepared the petition for a writ of certiorari (Pet. 5 n.1) – shows that petitioner's counsel expressly consented to the magistrate's conducting jury selection. Contrary to petitioner's contention (Pet. 6-8), therefore, this case is not like *Gomez*, where the defendant objected to the magistrate's role. Nor is it like *United States* v. *France*, 886 F.2d 223 (9th Cir. 1989), where the defendant neither objected nor consented to the court's use of a magistrate to select the jury.[3] Here, petitioner's

[3] In *France*, the Ninth Circuit held that a defendant did not waive a claim based on the Magistrates Act by failing to object to the

counsel agreed in open court to have a magistrate preside at the jury selection.

Second, petitioner did not argue in his brief on appeal that his conviction must be reversed because a magistrate conducted voir dire. It is well settled, however, that an issue not raised in the district court or the court of appeals is not properly presented for this Court's review. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. In any event, petitioner is incorrect in arguing that *Gomez* requires reversal of his convictions. The Court framed the issue before it in *Gomez* as "whether [a magistrate's] presiding at the selection of a jury in a felony trial *without the defendant's consent* is among" the duties that the Magistrates Act authorizes magistrates to perform. 109 S. Ct. at 2239 (emphasis added). The Court held that the statute does not authorize that procedure. The Court further ruled that the error could not be deemed harmless when, "*despite the defendant's objection*, and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added). Accordingly, this Court explicitly limited the reach of its holding in *Gomez* to situations in which the district court delegated jury selection to a magistrate without the defendant's consent. Thus, as the court of appeals held in *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1546 (2d Cir. 1989), petition for cert. pending, No. 89-5949, the *Gomez* decision does not require the reversal of a convic-

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magistrate's presiding at voir dire. The court held that any objection would have been futile in light of settled Ninth Circuit precedent. This case, by contrast, does not involve a mere failure to object; petitioner's counsel expressly consented to a magistrate's conducting voir dire. Nor was the law in the Second Circuit settled at the time of the voir dire in this case. At the time, the Second Circuit's decision in *Gomez* was on review in this Court.

tion where the defendant consented to the magistrate's conducting voir dire.[4]

This is true even though it was petitioner's counsel – not petitioner himself – who agreed to have a magistrate conduct voir dire. In general, a criminal defendant "is bound by the * * * decisions of [his] counsel." *Reed* v. *Ross*, 468 U.S. 1, 13 (1984). See also *United States* v. *Cronic*, 466 U.S. 648, 658 (1984) ("we presume that the lawyer is competent to provide the guiding hand that the defendant needs"). The defendant's personal consent is needed only for a few "fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); see *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury [trial], or testify in one's own behalf are ultimately for the accused to make"). The decision whether to consent to the magistrate's conducting jury selection is not one of those basic decisions that cannot be made by counsel on the defendant's behalf.

3. Petitioner nevertheless maintains (Pet. 8-9) that the supervision of jury selection by a magistrate is a "jurisdictional defect" in the sense that the error may never be waived or cured by consent. That contention misapprehends this Court's use of the word "jurisdiction" in the *Gomez* opinion.

In *Gomez*, this Court held that the error under the Magistrates Act was not harmless because a defendant has

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[4] This Court has often held that a defendant may waive important constitutional rights. For example, the Court has held that a defendant may waive the right to be free from compulsory self-incrimination, *Garner* v. *United States*, 424 U.S. 648, 654 n.9 (1976), the right to counsel, *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275 (1942), and the right to a speedy trial. *Barker* v. *Wingo*, 407 U.S. 514, 525-528 (1972). The statutory right to have a district judge preside at jury selection occupies no special status that would preclude its waiver.

a basic right "to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." 109 S. Ct. at 2248. In context, the Court's use of the word "jurisdiction" appears to refer to the trial court's statutory authority—*i.e.*, that the district court had no authority under the Magistrates Act to refer jury selection to a magistrate. See also *United States* v. *Rodgers*, 466 U.S. 475, 479-480 (1984) (defining "jurisdiction" in 18 U.S.C. 1001 to mean "official, authorized functions"); cf. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982) (holding that time limit for filing Title VII claims could be waived or tolled even though Court had earlier termed the requirement "jurisdictional"). It does not follow, therefore, that the district court lacked subject matter jurisdiction in this case to enter a judgment of conviction. Nothing in *Gomez* even remotely suggests that the magistrate's supervision of jury selection divested the district court of the power to enter a judgment of conviction. As the Ninth Circuit noted in *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (en banc), cert. denied, 469 U.S. 824 (1984), "[t]he maxim that parties may not consent to the jurisdiction of federal courts * * * applies only where the parties attempt to confer upon an Article III court a subject matter jurisdiction that Congress or the Constitution forbid[s]."

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
J. DOUGLAS WILSON
Attorney

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